Neutral Citation Number: [2020] EWCA Civ 1259

Case No: C1/2020/0812

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
PLANNING COURT
MRS JUSTICE LANG
CO/3929/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2nd October 2020

Before:

LORD JUSTICE LEWISON
LORD JUSTICE FLOYD
and
LADY JUSTICE ASPLIN

- -

Between:

THE QUEEN (ON THE APPLICATION OF LOCHAILORT INVESTMENTS LIMITED)	**Appellant**
- and -	
MENDIP DISTRICT COUNCIL	**Respondent**
NORTON ST PHILIP PARISH COUNCIL	**Interested Party**

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- -

Richard Ground QC and Ben Du Feu (instructed by **Harrison Grant**) for the **Appellant**
Hashi Mohamed (instructed by **Law and Governance Mendip District Council**) for the **Respondent**
The Interested Party did not appear and was not represented

Hearing date: 28 July 2020

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Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on Friday 2nd October 2020.

Lord Justice Lewison:

The Issue

1. The main issue on this appeal is whether the Norton St Philip Neighbourhood Plan ("the Plan"), approved by Mendip DC as local planning authority, contains lawful policies managing development of ten parcels of land designated as Local Green Spaces ("LGSs"). Lang J held that it did. Her judgment is at [2020] EWHC 1146 (Admin). It contains a fuller recitation of the facts than is necessary for the purposes of this appeal; and the reader is referred to it for further information.

The legal framework

2. Neighbourhood development plans were introduced by the Localism Act 2011 as part of a policy to give local communities a greater say in the development and growth of their local area. Hence a neighbourhood plan may be promoted by a number of different bodies other than the local planning authority, such as a parish council. A neighbourhood development plan is "a plan which sets out policies (however expressed)" relating to the use and development of land in the neighbourhood: Planning and Compulsory Purchase Act 2004, s 38A (2). Once adopted, a neighbourhood plan forms part of the statutory development plan. The main consequence of this is that any application for planning permission must be determined in accordance with the development plan, unless material considerations indicate otherwise.

3. Before it can be adopted, a draft neighbourhood development plan must be consulted upon, publicised, and submitted for examination by an examiner appointed by the local planning authority. It must then be put to a local referendum. The examiner must be independent and have appropriate qualifications and experience. One of the examiner's tasks is to consider "whether the draft neighbourhood development order meets the basic conditions": Town and Country Planning Act 1990 Sched 4B para 8 (1) (a) ("the TCPA"). Although this legislation refers to a neighbourhood development order, it applies equally to a neighbourhood development plan: Planning and Compulsory Purchase Act 2004 s 38A (3). The TCPA goes on to provide in Sched 4B para 8 (2):

> "(2) A draft order meets the basic conditions if—
>
> (a) having regard to national policies and advice contained in guidance issued by the Secretary of State, it is appropriate to make the order,
>
> (b) having special regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses, it is appropriate to make the order,

> (c) having special regard to the desirability of preserving or enhancing the character or appearance of any conservation area, it is appropriate to make the order,
>
> (d) the making of the order contributes to the achievement of sustainable development,
>
> (e) the making of the order is in general conformity with the strategic policies contained in the development plan for the area of the authority (or any part of that area),
>
> (f) the making of the order does not breach, and is otherwise compatible with, EU obligations, and
>
> (g) prescribed conditions are met in relation to the order and prescribed matters have been complied with in connection with the proposal for the order."

4. The role of an examiner differs from that of an inspector considering a development plan document, such as a district development plan. This was explained by Holgate J in *R (Maynard) v Chiltern DC* [2015] EWHC 3817 (Admin). He pointed out at [13] (2):

> "whereas … a local plan needs to be "consistent with national policy" an Examiner of a neighbourhood plan has *a discretion to determine whether it is appropriate* that the plan should proceed having regard to national policy. The limited role of an Examiner to have *regard* to national policy when considering a draft policy applicable to a small geographical area should not be confused with the more investigative scrutiny required by PCPA 2004 in order for an Inspector examining a draft Local Plan to determine whether such a plan is "sound"." (Original emphasis)

5. The examiner must produce a reasoned report to the local planning authority recommending (a) that the draft plan is submitted to a referendum, or (b) that modifications specified in the report are made to the draft plan and that the draft plan as modified is submitted to a referendum, or (c) that the proposal for the plan is refused. Once it has received the examiner's report, the local planning authority must consider each of the recommendations and decide what action to take. The ultimate decision is that of the local planning authority, which may consider matters that have arisen since the examiner's report. But if the local authority is satisfied that the draft plan (with or without any recommended modifications) meets the basic conditions and is compatible with Convention rights, a referendum on it must be held.

6. As we have seen, a neighbourhood development plan must have regard to national policies and advice contained in guidance issued by the Secretary of State. A statutory requirement of this kind requires a decision maker not only to take national policies into account but also to observe them and depart from them only if there are clear reasons for doing so: *Carpets of Worth Ltd v Wyre Forest DC* (1991) 62 P & CR 334, 342; *R (Khatun) v Newham LBC* [2004] EWCA Civ 55, [2005] QB 37 at [47].

Accordingly, although, as Holgate J rightly said, an examiner must decide whether it is appropriate for a plan to proceed having regard to national policy, a departure from that policy must be explained.

7. As is well-settled, the interpretation of a planning policy is a question of law for the court. It is to be contrasted with the exercise of planning judgment: *Tesco Stores Ltd v Dundee CC* [2012] UKSC 13, [2012] PTSR 983. The exercise of planning judgment has been described as forbidden territory, into which the court may not stray: *Keep Bourne End Green v Buckinghamshire Council* [2020] EWHC 1984 (Admin) at [94].

National planning policy

8. LGSs were introduced in response to a concern that areas of land were being registered as town or village greens otherwise than through the planning system. I described the process by which they were introduced in *R (Cooper Estates Strategic Land Ltd) v Wiltshire Council* [2019] EWCA Civ 840, [2019] PTSR 1980 at [4] to [10]. They were thus introduced into the National Planning Policy Framework (the "NPPF") as a possible designation.

9. The provisions of the NPPF that directly relate to LGSs are contained in paragraphs 99 to 101 which provide:

> "99. The designation of land as Local Green Space through local and neighbourhood plans allows communities to identify and protect green areas of particular importance to them. Designating land as Local Green Space should be consistent with the local planning of sustainable development and complement investment in sufficient homes, jobs and other essential services. Local Green Spaces should only be designated when a plan is prepared or updated, and be capable of enduring beyond the end of the plan period.
>
> 100. The Local Green Space designation should only be used where the green space is:
>
> a) in reasonably close proximity to the community it serves;
>
> b) demonstrably special to a local community and holds a particular local significance, for example because of its beauty, historic significance, recreational value (including as a playing field), tranquillity or richness of its wildlife; and
>
> c) local in character and is not an extensive tract of land.
>
> 101. Policies for managing development within a Local Green Space should be consistent with those for Green Belts."

10. The ordinary meaning of "consistent" is "agreeing or according in substance or form; congruous, compatible". What this means, in my judgment, is that national planning policy provides that policies for managing land within an LGS should be substantially the same as policies for managing development within the Green Belt. Accordingly, because paragraph 101 aligns management of development within an LGS with

management of development in the Green Belt, it is also necessary to refer to what the NPPF says about the latter. Paragraph 133 states:

> "The fundamental aim of Green Belt policy is to prevent urban sprawl by keeping land permanently open; the essential characteristics of Green Belts are their openness and their permanence."

11. Paragraphs 135 and 136 deal with the establishment of new areas of Green Belt and the adjustment of their boundaries. Both paragraphs stress that this is to be done only in "exceptional circumstances". The NPPF then goes on to deal with development in the Green Belt. Paragraphs 143 to 145 of the NPPF provide:

> "143. Inappropriate development is, by definition, harmful to the Green Belt and should not be approved except in very special circumstances.
>
> 144. When considering any planning application, local planning authorities should ensure that substantial weight is given to any harm to the Green Belt. 'Very special circumstances' will not exist unless the potential harm to the Green Belt by reason of inappropriateness, and any other harm resulting from the proposal, is clearly outweighed by other considerations.
>
> 145. A local planning authority should regard the construction of new buildings as inappropriate in the Green Belt. Exceptions to this are:
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> a) buildings for agriculture and forestry;
>
> b) the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, outdoor recreation, cemeteries and burial grounds and allotments; as long as the facilities preserve the openness of the Green Belt and do not conflict with the purposes of including land within it;
>
> c) the extension or alteration of a building provided that it does not result in disproportionate additions over and above the size of the original building;
>
> d) the replacement of a building, provided the new building is in the same use and not materially larger than the one it replaces;
>
> e) limited infilling in villages;
>
> f) limited affordable housing for local community needs under policies set out in the development plan (including policies for rural exception sites); and

> g) limited infilling or the partial or complete redevelopment of previously developed land, whether redundant or in continuing use (excluding temporary buildings), which would:
>
> - not have a greater impact on the openness of the Green Belt than the existing development; or
>
> - not cause substantial harm to the openness of the Green Belt, where the development would re-use previously developed land and contribute to meeting an identified affordable housing need within the area of the local planning authority."

12. Paragraph 146 describes other forms of development in the Green Belt that are not inappropriate. They include:

> "material changes in the use of land (such as changes of use for outdoor sports…)"

13. It can thus be seen that national planning policy relating to the Green Belt permits any form of development where that is justified by very special circumstances; and it also describes as "not inappropriate" the various types of development described in paragraphs 145 and 146. Relevantly, those expressly mentioned types of development include the provision of appropriate facilities (in connection with the existing use of land or a change of use) for outdoor sport, changes of use for outdoor sport, limited infilling in villages, and limited affordable housing for local communities. But even in those cases paragraph 144 requires that planning authorities give "substantial weight" to any harm to the Green Belt.

The making of the Plan

14. The draft plan was formulated by the Norton St Philip parish council after extensive consultation. During the consultation representations were made on behalf of Lochailort Investments Ltd, a property developer that had purchased land in Norton St Philip for development. Among the plots of land that it owns are two which were proposed to be designated as LGSs: LGSNSP007 Fortescue Fields South and LGSNSP008 Fortescue Fields West. Its proposals for that land include various forms of development that, according to the NPPF, are "not inappropriate" in the Green Belt. In its representations, Lochailort contended that the proposed housing allocations were too few (for the area in general and Norton St Philip in particular) and that the draft did not contribute to the achievement of sustainable development. It also suggested that the proposed LGS designations—especially for LGS8—were excessive, did not meet the criterion of importance and/or were inconsistent with national policy, as they were sterilising land for development. Lochailort's representations were not accepted.

15. In February 2019 planning consultants on behalf of the Parish Council prepared a "Basic Conditions Statement" which was later submitted to Mendip.

16. The policy under challenge is Policy 5 of the Plan (unchanged from the draft) which states:

> "Development on Local Green Spaces will only be permitted if it enhances the original use and reasons for the designation of the space."

17. One of the purposes of the Basic Conditions Statement was to deal with the question whether the draft was compatible with the NPPF. That section of the Statement was headed: "Conformity of [the Plan] to the NPPF2019". In relation to policy 5, it stated:

> "The designation of these Local Green Spaces is authorised by the NPPF. These sited have been carefully selected by the Parish Council, working with the LPA and meet the criteria required by the NPPF."

18. It did not, however, benchmark Policy 5 against national Green Belt policy.

19. Following consultation, the draft plan was sent for examination on 23 January 2019. The examiner was Ms Ann Skippers MRTPI FRSA AoU.

20. In her report the examiner proposed certain amendments to the draft plan, none of which is material to this appeal. Following that report, Lochailort's solicitors wrote to Mendip asking for any decision to be deferred. They set out paragraph 99 of the NPPF and asserted that there was no reference or consideration of the fundamental requirement that the LGSs should be capable of enduring beyond the end of the plan period. Nor, they said, was there any evidence that they were capable of doing so; and they also asserted that sustainable sites, such as Fortescue Field, would be needed "in the very near future" to address the shortfall in deliverable sites for housing development. Mendip made no substantive response to that letter, although it was placed before the cabinet. But there is no explicit discussion of the point in the report to cabinet, or in the minutes of the meeting.

21. On 2 September 2019 Mendip, as local planning authority, approved the draft, with the proposed amendments, and resolved that it proceed to a referendum. It is that decision which Lochailort challenges. Although Lochailort's property interest is in only two of the designated LGSs, its grounds of challenge potentially affect them all.

The challenge

22. Mr Ground QC raises four grounds of challenge:

    i) Policy 5 of the Plan fails to meet the basic condition stated in paragraph 8 (2) (a) because it is inconsistent with national Green Belt policy;

    ii) The designation of the LGSs was unlawful because the planning authority did not consider whether the LGSs were capable of enduring beyond the plan period and thus failed to comply with paragraph 99 of the NPPF;

    iii) The judge was wrong to repair the deficiencies in the examiner's report by applying in her favour a presumption that she must have taken national policies into account even though she did not explicitly consider them;

iv) The Plan was not in general conformity with strategic development policies in the local plan, and thus failed to comply with the basic condition stated in paragraph 8 (2) (e).

Is Policy 5 lawful?

23. There are, in essence, two separate but related questions: (a) were the ten parcels of land lawfully designated as LGSs and (b) if they were, is Policy 5 lawful? It is, I think, convenient to take the second question first, which is Mr Ground's first ground of challenge.

24. The Basic Conditions Statement dealt with the first of these questions, but in my judgment it did not deal with the second. It did not consider the terms of Policy 5 at all.

25. The examiner dealt with the LGSs in section 12 of her report. She began by referring to the relevant paragraphs of the NPPF (including paragraph 101) and stated:

> "The NPPF explains that LGSs are green areas of particular importance to local communities. The management of development in such areas is consistent with Green Belt policy."

26. She then considered in some detail whether the sites had been correctly designated as LGSs; and concluded that they had been. She went on to say:

> "While many of the proposed LGSs are located beyond existing development, this reflects the topography and the historic nature of development and I do not regard it as a ruse to prevent development."

27. The examiner's report also stated:

> "The policy designates these areas, cross references Figure 2 (but it should be 5) which shows the areas and only permits development which enhances the use and reasons for the designation of the LGSs. It is clearly worded. With a modification for accuracy, the policy will meet the basic conditions."

28. The judge placed some reliance on this part of the examiner's report. But whether the policy is clear, and whether it is consistent with development management of the Green Belt are, in my judgment two separate questions. The first of the passages I have quoted seems to me to be no more than a summary of the NPPF, with its general reference to the management of development "in such areas". The last sentence of the quoted extract at [27] is all that the examiner said about policy 5 itself. That sentence is no more than an unreasoned assertion. Since the essential feature of a neighbourhood development plan is that it sets out *policies*, on the face of it a failure to consider the terms of the policy itself is likely to be a significant omission.

29. Mr Ground QC submitted that there are a number of ways in which Policy 5 is more restrictive than Green Belt policy:

i) Green Belt policy allows appropriate development for example for limited affordable housing or for appropriate facilities for outdoor sport. Policy 5 does not allow "appropriate development" but a very small category of development which "enhances the original use and reasons for the designation of the space" and would clearly not allow either of these examples.

ii) Green Belt policy allows development if very special circumstances are shown to exist. Policy 5 does not.

iii) Green Belt policy would allow the sites to be used for outdoor sport if such development preserves openness. Policy 5 would not because it requires any development to enhance the original use. This does not permit a change of use.

iv) Policy 5 requires any development to enhance the reasons for the designation. Green Belt policy does not require enhancement of the purposes or openness but their preservation. The Green Belt test is a "do no harm" test, rather than a "make it better" test.

30. Mr Mohamed, for Mendip, emphasises that Policy 5 is a product of its locality, and was formulated after extensive consultation with the local community. The word "local" is repeated throughout the relevant paragraphs of the NPPF. I accept that that is so; but it does not address the question whether Policy 5 is lawful. Second, he says that the examiner considered paragraph 101 of the NPPF. It is true that she referred to it, but there is no explicit comparison of the effect of Policy 5 and national policy relating to the Green Belt. Third, he says, the judge was right to say that Policy 5 was sufficiently flexible to be interpreted consistently with Green Belt policy. I find it hard to see any flexibility in Policy 5. It is quite clear that no development will be permitted on any of the LGSs unless it enhances both the original use of the LGS in question and the reasons for its designation. Indeed, the clarity of the policy was something that the examiner herself remarked on. Fourth, he says, Policy 5 is site specific to the LGSs in this particular village; and it is not appropriate to apply the categories of development permitted by national Green Belt policy to these particular LGSs. He may or may not be right about that. Whether he is right (a) is a question of planning judgment which is not for the court to make; and (b) would be a departure from national policy requiring reasoned justification. He also relied on the examiner's statement that the designation of the LGSs was not "a ruse to prevent development". But that observation was made in the context of whether the spaces should be designated as LGSs in the first place; not to the question what planning policy should be applied to them once designated.

31. Mr Mohamed also submitted that the purpose and policy behind designating land as Green Belt and designating land as an LGS were different. That meant that it was inappropriate to read across national policies for managing development in the Green Belt to the management of development in an LGS. The difficulty with this submission is that it ignores paragraph 101 of the NPPF which expressly requires consistency between the two. Mr Mohamed was unable to explain what consistency meant on his analysis; and was unable to give any example of a policy in a neighbourhood plan which would fail the test of consistency as he analysed it. I also consider that Mr Mohamed was wrongly treating Lochailort's challenge as amounting to a submission that LGS policies in a neighbourhood plan would be unlawful unless they replicated national Green Belt policy. But that is not the challenge. It is accepted

that, provided the departure from the NPPF is explained, there may be divergence between LGS policies in a neighbourhood plan and national Green Belt policy.

32. Finally, it seemed to me that many of Mr Mohamed's arguments were directed to the question whether LGSs had been lawfully designated; rather than to the question whether, once designated, Policy 5 was itself unlawful.

33. I agree with Mr Ground that in all the ways he identified Policy 5 is more restrictive than national policies for managing development within the Green Belt. In my judgment that means that it is not consistent with national Green Belt policy. It does not, therefore, comply with paragraph 101 of the NPPF. Non-compliance with the NPPF does not, of course, automatically mean that a policy in the terms of Policy 5 is unlawful. The NPPF is a material consideration but it is not the law. The statute requires no more than that regard must be had to it. But if a neighbourhood plan departs from the NPPF it must be a reasoned departure. No reasons for the departure were given in this case.

34. I do not regard this conclusion as being an inappropriately forensic analysis of the examiner's report. Put bluntly, there is a gaping hole in the reasoning in this respect. None of the papers put before Mendip independently considered this question; and therefore the validity of the decision in this respect is, in effect, dependent on the examiner's report.

35. Having summarised the relevant provisions of the NPPF the judge dealt with this question of compatibility with Green Belt policies in a single paragraph:

> "In my judgment, the development policy in Policy 5 is sufficiently broad in scope so as to be interpreted and applied consistently with Green Belt policy. Plainly some development policies which are suitable for vast areas of Green Belt are not going to be appropriate for small areas of LGS in a country village, where part of the purpose of designation is to protect openness and views. For example, it seems unlikely that construction of housing on LGS7 and LGS8 is going to meet the requirements of Policy 5 or be consistent with Green Belt policy. However, landscaping, buildings and other structures relating to, for example, agricultural use, community use and enjoyment, recreation and sport could all potentially enhance the use and reasons for the designation."

36. There are, in my judgment, a number of difficulties with this paragraph. First, having approved the examiner's view that the policy was clearly worded, the judge interpreted it as flexible. Second, whether some Green Belt development policies are unsuitable for an LGS is a question of planning judgment. I do not say that it would be unlawful to reach that conclusion, but it would represent a departure from national planning guidance which requires reasoned justification. There is none to be found in the examiner's report. Indeed, as I have said, the examiner did not discuss the terms of Policy 5 at all. Third, whether development would or would not be consistent with Green Belt policy is also a matter of planning judgment in relation to an individual application for planning permission; not a question of interpretation of the policy itself. Fourth, although it is no doubt correct to say that part of the purpose of

designating land as an LGS is to preserve openness, that is equally part of the purpose of designating land as Green Belt. As paragraph 133 of the NPPF states, openness is an "essential characteristic" of Green Belt land. I respectfully disagree with the judge's conclusion on this issue.

37. In my judgment, therefore, on the assumption that the ten parcels of land were lawfully designated as LGSs, Policy 5 does not satisfy the basic condition in paragraph 8 (2) (a) of the TCPA. I would allow the appeal on this ground.

Were the LGSs lawfully designated?

38. The second question is whether the ten parcels could have been designated as LGSs in the first place. Whether they met the criteria in paragraph 100 of the NPPF is a question of planning judgment rather than of law. The examiner's conclusions in that respect could not be (and are not) challenged. Rather, the challenge is that there was no consideration of that part of paragraph 99 of the NPPF which states that:

> "Local Green Spaces should … be capable of enduring beyond the end of the plan period."

39. Mr Ground's essential submission is that this question was never considered. That is all the more surprising as the precise point was put to Mendip in the letter of 2 August 2019 after the examiner had reported.

40. The judge was influenced by Lord Carnwath's statement in *Hopkins Homes Ltd v Secretary of State for Communities and Local Government* [2017] UKSC 37, [2017] 1 WLR 1865 at [25]:

> "Furthermore, the courts should respect the expertise of the specialist planning inspectors, and start at least from the presumption that they will have understood the policy framework correctly. With the support and guidance of the planning inspectorate, they have primary responsibility for resolving disputes between planning authorities, developers and others, over the practical application of the policies, national or local. As I observed in the Court of Appeal (*Wychavon District Council v Secretary of State for Communities and Local Government* [2009] PTSR 19, para 43) their position is in some ways analogous to that of expert tribunals, in respect of which the courts have cautioned against undue intervention by the courts in policy judgments within their areas of specialist competence:"

41. Mr Ground submits that an examiner should not have the benefit of this presumption. An examiner is appointed by the local planning authority, rather than by the Secretary of State. An examiner does not have the benefit of support by the planning inspectorate. The examiner is not an independent decision maker in the same way as a planning inspector.

42. In her report, however, the examiner explained that she was independent of both the parish council and the local planning authority. She also stated that she had over 30

years of experience as a chartered town planner, including the examination of neighbourhood plans. Those attributes are what the TCPA requires. Given all that, I see no reason to adopt a different starting point from that applicable to an inspector. In this respect I agree with the judge at [94] and [105].

43. That said, the presumption is not irrebuttable. It does not permit a court to ignore legal errors if they exist. So the question still remains: did the examiner consider whether the LGSs were capable of enduring beyond the plan period?

44. The judge dealt with this point as follows:

> "[162] This sentence was set out in the [Plan], in paragraph 12.1. As I have already indicated, I am satisfied that the experienced Examiner considered the entirety of paragraphs 99 to 101, when considering whether Basic Condition (a) was met. It can be assumed that specialist planning inspectors and examiners are familiar with the relevant policies and failure to mention a specific policy is not, of itself, evidence that they have overlooked it. They are not writing an examination paper in which they must demonstrate their knowledge to the reader.
>
> [163] In my view, the likely reason for the absence of any specific reference as to whether these designations were capable of enduring beyond the end of the plan period was that this criterion was clearly met. The Examiner, and in turn [Mendip], accepted the legitimacy of the Parish Council's [Plan] proposal and its representations that these sites were not suitable for development (as the Appeal Inspectors had already found), and that sustainable development could and should take place elsewhere in and around the village."

45. Mr Ground emphasised, by reference to cases about changes to the Green Belt, that boundaries should only be changed in exceptional circumstances. He reasoned by analogy that the same should apply to the designation of an LGS. But the flaw in this argument is that the policy requirement of paragraph 99 of the NPPF is no more than that the LGS should be *capable* of enduring beyond the plan period. It is not a policy requirement that the LGS must inevitably last beyond that period. Nor does it specify how far into the future the local planning authority must gaze. Nor does paragraph 99 of the NPPF incorporate the statement in paragraph 135 of the NPPF that new Green Belts should only be established "in exceptional circumstances". I agree with the judge at [35] that this is a less stringent requirement than that applicable to designation as Green Belt; as is paragraph 139 b) of the NPPF (namely that land should not be designated as Green Belt if it is unnecessary to keep it "*permanently*" open). Permanence is a higher bar than capability to endure beyond the plan period. In addition, paragraph 139 e) requires the local planning authority to be able to demonstrate that Green Belt boundaries *will not* need to be altered at the end of the plan period. This, too, is a higher bar than being capable of enduring beyond the plan period. A designated LGS might not be capable of enduring beyond the plan period if, for example, pressure on development, and in particular the supply of new housing, would probably require it to be given up for development before the end of the plan period. If, on the other hand, pressure for development can be satisfied elsewhere

within the neighbourhood over the plan period, it is likely that a designated LGS will at least be *capable* of enduring beyond the plan period. Given the examiner's conclusions in relation to other parts of the draft plan, and in particular the supply of land in Norton St Philip for housing over the plan period (as noted by the judge at [163]) I consider that the judge was justified in her conclusion.

46. The judge concentrated on the examiner's report. She did not mention the letter of 2 August 2019, except in passing. It was, I think, unwise of Mendip not to offer a substantive reply to that letter. Although I have paused over this point, in the end I do not consider that invalidates the decision. It does not seem to me that the letter contained information that was unavailable to the examiner; and as things have turned out Mendip has proposed to allocate a further site in Norton St Philip for housing development. So that would relieve pressure on development to a greater extent than was apparent to the examiner.

47. Mr Ground also relied to some extent on the interim note prepared by the inspector examining the draft district plan (LLP2). He was of the view that far too many areas had been designated as LGSs over the district as a whole. In consequence, Mendip withdrew those designations. I am unable to place any significant weight on this point. The inspector was undertaking a different exercise. He was considering a district-wide plan and testing it by reference to different statutory criteria. He did not consider the LGSs individually but collectively. He also canvassed the possibility that the LGSs could be considered one by one; but because that would have held up the examination of the plan Mendip decided not to pursue that.

48. I would reject this ground of appeal.

49. The final ground of appeal is that the Plan proceeded on a misinterpretation of the strategic policies in the development plan. It will be recalled that one aspect of the basic conditions is that a neighbourhood development plan must be "in general conformity with the strategic policies contained in the development plan". Lindblom LJ elucidated the meaning of that phrase in *R (DLA Delivery Ltd) v Lewes DC* [2017] EWCA Civ 58, [2017] PTSR 949 at [23]:

> "The true sense of the expression "in general conformity with the strategic policies contained in the development plan" is simply that if there are relevant "strategic policies" contained in the adopted development plan for the local planning authority's area, or part of that area, the neighbourhood development plan must not be otherwise than in "general conformity" with those "strategic policies". The degree of conformity required is "general" conformity with "strategic" policies. Whether there is or is not sufficient conformity to satisfy that requirement will be a matter of fact and planning judgment."

50. Mr Ground submitted that the exercise of that planning judgment is predicated on the correct interpretation of the strategic policies in the development plan. The interpretation of a policy in a development plan is a question of law which is ultimately for the court to resolve. That is plainly correct: *Tesco Stores Ltd v Dundee CC*. He went on to argue that if the decision maker adopts the wrong starting point for the exercise of planning judgment, the judgment itself is flawed. In this case, he

said, the local planning authority had misinterpreted policy CP2 in the local development plan (LLP1). That policy requires 505 dwellings to be allocated to the north east of the district, including on sustainable sites in Primary Villages. Norton St Philip is identified as a Primary Village.

51. The examiner commented that:

> "The LPII [i.e. the Mendip local plan in the course of preparation] does not propose any site allocations for Norton St Philip. The proposed settlement boundary subject of Policy 1 and the proposed Local Green Spaces subject of Policy 5 align with the proposed settlement boundary and proposed LGSs in the LPII."

52. Following comments made by the inspector charged with the examination of the emerging local plan (LLP2), Mendip appreciated that policy CP2 did require the allocation of housing in the north east of the district, and that it was to be satisfied in the primary villages, of which Norton St Philip is one. Mendip therefore found a site in Norton St Philip on which 27 dwellings could be built. That site is, coincidentally, owned by Lochailort but it is not one of the LGSs.

53. The judge said of this ground:

> "[125] Although the assumptions made in the [Plan] about the housing requirements of LPP1 have subsequently been found to be partially incorrect, I do not consider that this undermines the [Plan] to such an extent that it retrospectively renders [Mendip's] decision on the [Plan] unlawful. The specific proposals for housing in the [Plan] are unaffected. In the short term, the further required housing allocation will be given effect by LLP2, which will supersede the [Plan] in that respect, as the most recent plan in the development plan. The [Plan] can be updated in the forthcoming Mendip Local Plan Review to align with LPP2, if required. [Lochailort] now has the opportunity to seek planning permission for a 27 dwelling development at Site NSP1 with a realistic prospect of success."

54. The interpretation of a policy is a question of law. Once correctly interpreted it means what is has always meant. There is no retrospectivity involved. It is no different from a case in which a disappointed applicant for planning permission challenges a local planning authority's interpretation of a policy (whether national or local) by court proceedings, and the court upholds the challenge. The court will interpret the policy, and if the local planning authority has misinterpreted it in a way that materially affects its decision, the decision will be declared unlawful. To that extent it may be said that the court's reinterpretation is retrospective; but that is inherent in disputed questions of interpretation. Nevertheless, it seems to me that if the misinterpretation of the policy has had no material effect, the decision may nevertheless be upheld.

55. I think that this is what the judge must have meant by her comment that the misinterpretation did not undermine the Plan "*to such an extent*" that it rendered

Mendip's decision on the Plan unlawful. In other words, I think she was saying that the misinterpretation was not material. I agree with her.

56. I would reject this ground of appeal.

Result

57. In short, I consider that each of the areas was lawfully designated as an LGS; but that Policy 5, which applies to them once designated, is not consistent with national planning policies for managing development within the Green Belt. In the absence of reasoned justification, the consequence is that Policy 5 is unlawful. I would allow the appeal on that ground alone.

Lord Justice Floyd:

58. I agree.

Lady Justice Asplin:

59. I also agree.